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Nos. 07-588, 07-589 & 07-597

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In The

Supreme Court of the United States

ENTERGY CORPORATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

PSEG FOSSIL LLC AND PSEG NUCLEAR LLC,
Petitioners,

v.

RIVERKEEPER, INC., ET AL.,
Respondents.

UTILITY WATER ACT GROUP,
Petitioner,

v.

RIVERKEEPER, INC., ET AL.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RIVERKEEPER, INC., ET AL. IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded the Environmental Protection Agency's Phase II cooling water intake structure regulations for further rulemaking because of uncertainty as to whether EPA based its determination of "best technology available" ("BTA") on cost-benefit analysis rather than on economic availability, cost-effectiveness, or other considerations permissible under the plain language of Clean Water Act section 316(b). (07-588 Q3; 07-589 Q1; 07-597 Q1)

2. Whether the court of appeals correctly followed its Phase I decision and remanded a provision in EPA's Phase II cooling water intake structure regulations that would have allowed compliance with section 316(b) through "restoration measures." (07-589 Q2; 07-597 Q2)

3. Whether section 316(b) of the Clean Water Act applies to both new and existing facilities, as its plain language makes clear and as the courts and EPA have consistently recognized since the statutory provision was enacted in 1972. (07-588 Qs1&2)

CORPORATE DISCLOSURE STATEMENT

Respondents Riverkeeper, Inc., Natural Resources Defense Council, Waterkeeper Alliance, Soundkeeper, Inc., Scenic Hudson, Inc., Save the Bay—People for Narragansett Bay, Friends of Casco Bay, American Littoral Society, Delaware Riverkeeper Network, Hackensack Riverkeeper, Inc., New York/New Jersey Baykeeper, Santa Monica Baykeeper, San Diego Baykeeper, California Coastkeeper, Columbia Riverkeeper, Conservation Law Foundation, and Surfrider Foundation have no parent corporations, and no publicly owned company owns stock in them.

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COUNTER STATEMENT OF THE CASE

In language not repeated elsewhere in the Act or in any other federal statute, section 316(b) of the Clean Water Act ("CWA") provides that "[a]ny standard established pursuant to section 301 or section 306 of this Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available ['BTA'] for minimizing adverse environmental impact." 33 U.S.C § 1326(b). Section 316(b) is the only provision in the statute that regulates water *withdrawals*, as opposed to *discharges*. In this case, which presents questions of first impression concerning the application of this unique statutory language to a novel Environmental Protection Agency (EPA) rulemaking, the Second Circuit unanimously remanded EPA's rule for further explanation and possible revision. *Riverkeeper, Inc. v. EPA* ("*Riverkeeper II*"), 475 F.3d 83 (2d Cir. 2007); App. 1a-86a.[1] Significantly, EPA has not sought review by this Court and is reconsidering its rule on remand. Only industry parties have filed petitions for certiorari.

The petitions should be denied for three reasons. First, the further administrative proceedings on remand make review premature, and petitioners' exaggerated claims about the purportedly devastating impact of the court's ruling ignore the indisputable fact that the effect of that ruling has yet to be determined. Second, there are no circuit splits. Third, the court's decision is correct on the merits, and there is no

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[1] Citations to "App." refer to petitioner PSEG's appendix.

compelling reason for this Court to review the court of appeals' fact-specific application of this unique statutory language to EPA's rulemaking.

Cooling Water Intake Structures

Section 316(b) directs EPA to regulate cooling water intake structures, through which power plants and other heavy industrial facilities withdraw cooling water from natural waterbodies. Such structures "kill or injure billions of aquatic organisms every year" by trapping (or "impinging") them against grills or screens or drawing them into the cooling system ("entraining" them). *Riverkeeper II*, App. 2a; *see also Riverkeeper, Inc. v. EPA* (*"Riverkeeper I"*), 358 F.3d 174, 181 (2d Cir. 2004) ("A single power plant might impinge a million adult fish in just a three-week period, or entrain some 3 to 4 billion smaller fish and shellfish in a year, destabilizing wildlife populations in the surrounding ecosystem."). Intake structures affect the full spectrum of aquatic organisms, from plankton to sea turtles, including threatened and endangered species. 69 Fed. Reg. 41,575, 41,586-87 (July 9, 2004).

Available technology can dramatically reduce this environmental damage. Some plants are "dry-cooled" by air instead of water, and many others employ "closed-cycle" water cooling systems that reduce withdrawals and aquatic mortality by 70 to 96 percent compared to the relatively primitive "once-through" cooling systems used by older plants. Virtually all gas-fired power plants and two-thirds of coal-fired plants built in the last 25 years use closed-cycle cooling. 66 Fed. Reg. 28,853, 28,856 (May 25, 2001); *see also* NEI *Amicus* Br. 16 (about 40 percent of nuclear plants are closed-cycle). Other technologies, such as fine-mesh

screens, barrier nets, and fish diversion or return systems, are designed to exclude organisms from intakes or return them to waterways.

EPA Rulemaking under Section 316(b)

The 1976 Regulations. In 1976, EPA promulgated section 316(b) regulations,[2] but the regulations were remanded by the Fourth Circuit because of a notice-and-comment violation, *Appalachian Power Co. v. Train*, 566 F.2d 451, 457 (4th Cir. 1977), and withdrawn. 44 Fed. Reg. 32,853, 32,956 (June 7, 1979). EPA issued no new section 316(b) regulations in the 1980s or 1990s. Absent regulations, permits for intake structures were issued during that time by EPA and state agencies on a case-by-case, "best professional judgment" basis.

Between 1995 and 2002, EPA agreed to a series of consent decrees requiring it to conduct rulemaking under section 316(b), and ultimately decided to pursue the rulemaking in three phases: (1) Phase I (new facilities); (2) Phase II (large existing power plants); and (3) Phase III (small existing power plants and all other existing facilities). App. 4a-5a.

Phase I. In 2001, EPA promulgated its Phase I Rule covering cooling water intake structures at new facilities. 66 Fed. Reg. 65,255 (Dec. 18, 2001). The Phase I Rule requires larger new facilities to use

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[2] At that time, EPA refused to determine BTA based on cost-benefit analysis, explaining that "[t]he statute directs the Agency to ... select the most effective means of minimizing (i.e., 'reducing to the smallest possible amount or degree') th[e] adverse effects." 41 Fed. Reg. 17,387, 17,388 (Apr. 26, 1976).

cooling water intakes that withdraw no more water than a closed-cycle system. 40 C.F.R. § 125.84(b)(1). The Phase I Rule also includes a second compliance track under which a facility can escape limits on intake flows if it uses other technologies that achieve comparable reductions of adverse environmental impacts, *see* 40 C.F.R. §§ 125.84(d)(1), 125.86(c)(2), and a "variance" provision if compliance at a particular facility would be excessively costly or have adverse impacts on air or water quality or energy markets. 40 C.F.R. § 125.85. In addition, the Phase I Rule would have allowed compliance solely through habitat "restoration measures" designed to offset the adverse impact of cooling water withdrawals. 66 Fed. Reg. at 65,280-81. Like the remanded 1976 regulations, the Phase I requirements were *not* based on cost-benefit analysis. Instead, EPA "selected best technology available for minimizing adverse environmental impact on the basis of what it determined to be an economically practicable cost for the industry as a whole." 66 Fed. Reg. at 65,309. EPA gave three reasons, including "cost-effectiveness," for rejecting standards based on dry cooling. 66 Fed. Reg. at 65,282-84.

In consolidated challenges by environmentalists and industry, the Second Circuit upheld most of the Phase I Rule, *Riverkeeper I,* 358 F.3d at 181, but remanded the "restoration measures" provision "as plainly inconsistent with the statute's text" because they did not involve the "location, design, construction, and capacity" of intake structures, *id.* at 189, and did not meet the statutory requirement of "minimizing the adverse environmental impact" of those structures. *Id.*

at 190. No party sought certiorari, and the *Riverkeeper I* decision is final.

Phase II. In 2004, EPA promulgated the Phase II Rule at issue here, applicable to large existing power plants. 69 Fed. Reg. 41,575 (July 9, 2004), codified at 40 C.F.R. § 125.90 *et seq*. The Phase II Rule set performance standards requiring a 60-90 percent reduction in entrainment and a 80-95 percent reduction in impingement, to be achieved through any technologies. 40 C.F.R. § 125.94(b). EPA based these standards on a suite of technologies.

The Phase II Rule included alternative compliance options allowing facilities to elect a less stringent determination of BTA based on either cost-cost analysis (comparison of a facility's costs to those considered by EPA) or *cost-benefit* analysis. 40 C.F.R. § 125.94(a)(5)(i), (ii). Like the Phase I Rule, the Phase II Rule also allowed compliance through "restoration measures." 40 C.F.R. § 125.94(c).

The Phase II Rule rejected stricter requirements based on closed-cycle cooling. One alternative EPA considered but rejected was a flow limit commensurate with closed-cycle cooling for 51 facilities – less than ten percent of the facilities covered by the rule – with extremely large withdrawals from waterbodies containing essential habitat and nursery areas. 67 Fed. Reg. 17,121, 17,155-58 (Apr. 9, 2002).

Both environmentalists and industry challenged the Phase II Rule in consolidated petitions. In the unanimous decision below, the Second Circuit rejected Entergy's claim that section 316(b) applies only to new facilities and remanded eight aspects of the rule to

EPA for further rulemaking because it found they were "inadequately explained or inconsistent with the statute, or because the EPA failed to give adequate notice of its rulemaking." App. 3a.

In the holding to which petitioners primarily object, the court of appeals stated: "If the EPA construed the statute to permit cost-benefit analysis, its action was not 'based on a permissible construction of the statute.'" *Id.* at 33a (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)). Significantly, the court of appeals did *not* construe section 316(b) as barring cost considerations entirely. Rather, it held that the "statutory language suggests that the EPA may consider costs in determining BTA, in that a technology that cannot not be reasonably borne by the industry is not 'available' in any meaningful sense," but that "cost-benefit analysis is not similarly supported by the language or purpose of the statute." *Id.* at 21a. The court further explained that, in determining BTA, EPA must "first determine what is the most effective technology" and "whether the industry as a whole can reasonably bear the cost of the adoption of the technology," *id.* at 23a, and that "EPA may then consider other factors, including cost-effectiveness, to choose a less expensive technology that achieves essentially the same results as the benchmark." *Id.* at 23a-24a. Finally, the court explained that EPA "may also depart from this performance benchmark because of other permissible considerations aside from cost, for instance, energy efficiency or environmental impact." *Id.* at 24a n.12 (citing *Riverkeeper I*, 358 F.3d at 195-96).

Notably, the court's ruling concerning the appropriate role of costs under section 316(b) did not lead it to reject EPA's BTA determination definitively. Although the court said that cost-benefit analysis "appears to have played some role" in EPA's BTA determination, *id.* at 29a, the court found it "*unclear* whether the Agency improperly weighed the benefits and the costs." *Id.* (emphasis added); *see also id.* at 32a ("[I]t is *impossible to tell* whether the EPA based its decision on permissible cost-effectiveness analysis or exceeded its authority by relying impermissibly upon a cost-benefit analysis.") (emphasis added). As a result, the court concluded that "[i]t may also be that the EPA misunderstood or misapplied cost-effectiveness analysis" or "may have simply failed either to perform the required analysis or to explain adequately a decision that was within its authority to make." *Id.* at 33a. Accordingly, the court "remand[ed] to the EPA the provision establishing BTA so that it may provide either a reasoned explanation of its decision or a new determination of BTA based on permissible considerations." *Id.* at 85a. Importantly, the court required only "clarification of the basis for the Agency's action and *possibly* ... a new determination of BTA." *Id.* at 33a (emphasis added). The court also remanded several other provisions that were based on the same considerations as, or closely interrelated with, the BTA determination.

With respect to restoration measures, the court followed its decision in *Riverkeeper I* in finding that, by allowing compliance through restoration measures, EPA had impermissibly construed section 316(b). *Id.* at 85a.

Finally, the court rejected Entergy's claim that section 316(b) applies only to new facilities, *id.* at 65a-70a, holding that the plain language of section 316(b), and in particular its reference to section 301, which applies to existing point sources, indicates that the section applies to existing facilities, and that even if the language were ambiguous, EPA's reasonable and longstanding interpretation of it as applying to existing facilities was entitled to *Chevron* deference.

EPA did not seek rehearing, and petitioners' rehearing requests were denied with no judge voting for rehearing. App. 88a-89a. Upon remand, the agency suspended virtually the entire Phase II Rule, 72 Fed. Reg. 37,107 (July 9, 2007), and commenced further rulemaking proceedings. Until EPA promulgates a new final Phase II Rule, "[p]ermit requirements for cooling water intake structures at Phase II facilities should be established on a case-by-case best professional judgment (BPJ) basis." *Id.* at 37,108. EPA's suspension of the rule thus restored the *status quo ante* with respect to permitting of power plant cooling water intakes that has been in effect for 35 years.

Phase III. In 2006, EPA promulgated Phase III regulations applicable to new offshore oil rigs, that were not based on cost-benefit analysis. 71 Fed. Reg. 35,005 (June 16, 2006). Simultaneously, EPA decided, on the basis of an explicit cost-benefit analysis, *not* to promulgate section 316(b) regulations for existing manufacturing facilities. *Id.* at 35,016-17. In consolidated petitions pending before the United States Court of Appeals for the Fifth Circuit, industry contends that EPA should have conducted a cost-

benefit analysis, while the environmental petitioners challenge EPA's explicit reliance on cost-benefit analysis. *ConocoPhillips Co., et al. v. EPA*, 5th Cir. Dkt. No. 06-60662 (and consolidated cases). Thus, the Fifth Circuit is currently considering "precisely the same issue" the Second Circuit decided below – whether EPA has authority to rely on cost-benefit considerations under section 316(b). UWAG Pet. 18; *see also* PSEG Pet. 13-14.

REASONS FOR DENYING THE PETITIONS

The decision below involves issues of statutory interpretation whose impact on the regulation at issue remains undetermined because of the court's remand to EPA for clarification of the basis of its decision. Moreover, the Second Circuit's conclusions that section 316(b) applies to existing facilities and that Congress intended EPA to implement that section without engaging in cost-benefit analysis or allowing compliance through "restoration" measures reflect application of standard principles of statutory construction to unique statutory language, applied to a single regulation, and do not conflict with decisions of any other court of appeals. Should a conflict eventually arise, there will be ample opportunity for this Court to address it either in the Phase III case that is still pending or in further judicial review proceedings once EPA completes its reconsideration of the Phase II Rule. Meanwhile, particularly in light of the correctness of each of the Second Circuit's rulings, review by this Court is not warranted.

I. THERE IS NO VALID REASON FOR REVIEW NOW, WHILE REMAND PROCEEDINGS ARE PENDING

The Second Circuit's decision remanded the Phase II Rule for further explanation and *possible* revision in light of the court's opinion. The court noted that "EPA in reconsidering its selection of BTA on remand may alter the suite of technologies it originally selected," App. 34a, but the court did not say such alteration was required, much less foreordain the exact features of a properly explained and justified rule.

EPA has not sought review of the court's ruling,[3] but instead has suspended the Phase II Rule almost entirely "while the Agency considers how to address the remanded issues." 72 Fed. Reg. at 37,108. As directed by the remand, EPA is reconsidering the core provisions of the Phase II Rule, including the BTA determination, the establishment of requirements reflecting BTA, and the various options for complying with or obtaining variances from those requirements. Whatever the result of its reevaluation, EPA must notice a new proposed Phase II Rule in the Federal Register for public comment and then, after considering and responding to those comments, issue a new Phase II Rule. Only when the regulatory process is complete will the practical impact of the Second Circuit's ruling become clear. Moreover, because major parts of the rule were also remanded on

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[3] Although we have no way of knowing what EPA may say in response to the petitions, we note that the non-extendable time in which EPA may file a response *supporting* the petitions under this Court's Rule 12.6 has long since passed.

grounds as to which petitioners have *not* sought this Court's review, further rulemaking would be required *even if* this Court were to grant the petitions and then agree with petitioners that EPA's BTA determination was proper. Thus, no action by this Court would reinstate the Phase II Rule as promulgated.

When it does promulgate a new Phase II Rule, EPA may change its BTA determination substantially, modestly, or not at all. Another round of judicial review is virtually inevitable, but whether it will be the industry petitioners or environmental groups that are aggrieved by how EPA carries out the remand remains to be seen. In any event, any further review will be based on a complete record, following proper notice and comment. The Second Circuit will then determine whether EPA's reexamination of its actions is consistent with section 316(b), supported by the record, and not arbitrary and capricious. In the event that, at the end of the day, the industry petitioners are dissatisfied by some feature of the final rule that is attributable to one of the aspects of the Second Circuit's holding that they now challenge, the petitioners could seek review of the issue by this Court at that time. The effectively interlocutory posture of the proceedings below thus counsels strongly against granting the petitions.

Meanwhile, the parade of economic and energy-related horribles petitioners and *amici* conjure up to justify review is, at this point, completely unfounded. Their forecasts of exorbitant compliance costs, facility closures, and grid failure are all premised on the hypothetical presupposition that EPA will promulgate a new rule that compels substantially all 550 Phase II

facilities to retrofit to closed-cycle cooling. *See* PSEG Pet. 32-36, UWAG Pet. 36-39. But petitioners themselves concede that the decision below does *not* mandate such a result. *See, e.g.*, UWAG Pet. 37 ("UWAG does not believe that retrofitting closed-cycle cooling can be justified even after *Riverkeeper II*...").

Indeed, petitioners and *amici* admit that their true concern is not with the decision itself, but with what they consider to be the "implication[s] of the Second Circuit's opinion," PSEG Pet. 33, or what they predict EPA or others will contend those implications are. *See, e.g.*, NEI *Amicus* Br. 9 (respondents "will no doubt argue that the court's reasoning requires that result"); *see also id.* at 2 ("court's reasoning may require the EPA to mandate" retrofits). But until the administrative process is complete, predictions about what EPA *may* do, or what others may *argue* it should do, do not justify this Court's intervention.[4]

Moreover, although predicting what EPA might ultimately include in a revised Phase II Rule is speculative, the BTA option EPA rejected on the basis of what appeared to the court of appeals to include improper considerations would *not* have established a flow limit based on closed-cycle cooling for all facilities, but *only* for the 51 largest plants (less than ten percent of those covered by the rule) located "on sensitive waterbodies." *Riverkeeper II* App. 29a; 67 Fed. Reg. at

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[4] If any permits are issued on a case-by-case basis while EPA is reconsidering the rule, permittees and other interested parties will have ample opportunities to challenge any permit provisions they consider to be improperly based on the "implications" of the Second Circuit's opinion.

17,156-58. EPA concluded that adverse economic and environmental effects of this alternative would be minimal and compliance costs low. *Id.*

Further, that EPA may base its BTA determination on a particular technology does not mean that all facilities will necessarily install that technology and incur the associated costs. For example, the Phase I Rule included both a second compliance track and a variance provision applicable if compliance would impose excessive costs or involve other adverse impacts. 40 C.F.R. §§ 125.84(d)(1), 125.86(c)(2), 125.85. Both alternative compliance provisions were upheld by the Second Circuit. *Riverkeeper I*, 358 F.3d at 187-89, 192-94.

PSEG's claim that the decision below "blithely accepts the bankruptcy or closure of numerous electricity generating facilities, *without considering impacts to the U.S. electric supply*," PSEG Pet. 34 (emphasis added), and numerous other similar claims regarding the court's alleged indifference to economic and technological burdens, facility closures, or energy impacts, are simply incorrect. As in *Riverkeeper I*, in the decision below the court recognized that a technology is not "available" unless its costs can be reasonably borne by the industry. *Riverkeeper II*, App. 21a; *Riverkeeper I*, 358 F.3d at 195. Cost-effectiveness may also be considered. *Riverkeeper II*, App. 23a. Moreover, the Second Circuit stated that other "permissible considerations" include "energy efficiency and production concerns." *Riverkeeper II*, App. 24a n.12 (citing *Riverkeeper I*, 358 F.3d at 195-96). Accordingly, EPA will, no doubt, consider economics, facility closures, and any energy impacts on remand,

and if the agency does not do so to petitioners' liking, they will surely challenge its decision once it is final.

Similarly unwarranted are the assertions by petitioners and *amici* that the decision below "will significantly affect our Nation's environmental priorities" by increasing fossil fuel consumption with its associated air pollution and greenhouse gases. *See, e.g.*, PSEG Pet. 32, 35; UWAG Pet. 38-39; NEI *Amicus* Br. 18-20. As petitioner UWAG admits, the decision below "acknowledges EPA's right to consider" such environmental effects. UWAG Pet. at 39. Again, EPA will doubtlessly consider them on remand, and if it does not, petitioners will surely challenge the revised rule on that basis.

Also unavailing are petitioners' claims of absurd results, such as the expenditure of billions of dollars to save "a single fish larvae." Entergy Pet. 3, 4; *see also* CWISC *Amicus* at 6 ("one additional fish"). To the contrary, the Phase II Rule applies only to facilities withdrawing large volumes of water, at least 50 million gallons per day, and, as EPA found, these large power plants kill aquatic organisms in enormous numbers. *See supra* at 2. Unless and until the course of actual rulemaking substantiates petitioners' purported fear that the agency will require extreme measures to save a single fish, their hyperbole provides no basis for review.

In short, even if petitioners' legal positions were arguably meritorious, which they are not, now is not the time for the Court to address them, particularly in light of the federal government's determination not to seek certiorari despite EPA's strong disagreement with aspects of the Second Circuit's ruling.

II. THERE IS NO CIRCUIT SPLIT

There are no conflicts among the circuits over the issues decided by the court of appeals. The absence of conflict is hardly surprising because section 316(b) is a singular provision rarely before construed, in part because of EPA's lengthy failure to promulgate cooling water intake standards. Indeed, until the Second Circuit's 2004 decision in *Riverkeeper I*, no court ever had occasion to review the substance of a section 316(b) regulation. Although Congress enacted section 316(b) in 1972, the only regulations EPA issued under that section – before its current, three-part rulemaking – were the 1976 regulations remanded by the Fourth Circuit on purely procedural grounds. *Appalachian Power Co. v. Train,* 566 F.2d 451, 457 (4th Cir. 1977). Only two other court of appeals decisions have construed section 316(b), both in the 1970s and in the context of permits issued by EPA on a case-by-case basis in the absence of national regulations. *U.S. Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977); *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306 (1st Cir. 1979).

Riverkeeper II is perfectly consistent with the very limited section 316(b) authority that preceded it – *Riverkeeper I* and the two 1970s permitting cases. There is no reason to abandon this Court's usual practice of awaiting a conflict among the circuits before accepting review. As petitioners themselves note, in reviewing EPA's Phase III rule the Fifth Circuit is currently considering "precisely the same issue" that the Second Circuit decided below as to whether EPA may rely on cost-benefit considerations under section 316(b). UWAG Pet. 18. If the Fifth

Circuit disagrees with the Second, and a conflict does materialize, there will be ample opportunity for EPA, petitioners, or any party aggrieved by either circuit's decision to seek this Court's review. Not only could Riverkeeper or the other environmental petitioners in the Phase III case file a petition for a writ of certiorari to the Fifth Circuit, but, in addition, once the Second Circuit reviews the revised Phase II Rule that EPA will issue on remand, any aggrieved parties could file a new petition for certiorari (assuming they were in fact injured by features of the revised rule attributable to the court's holding that the statute does not permit cost-benefit analysis). Review now, before a conflict has arisen, is unwarranted and unnecessary.

A. Cost Considerations

1. The decision below does not conflict with the First Circuit's 1979 decision in *Seacoast*. There, in approving a permit for New Hampshire's Seabrook power plant, the court did *not* hold that EPA may base section 316(b) determinations on cost-benefit considerations. 597 F.2d at 311. Indeed, in the single paragraph of the opinion that discussed costs, that court did not even consider that issue, nor was it asked to. Rather, noting that petitioners' challenge was "not a model of clarity" and understanding them only to "suggest that cost of delay is an improper consideration," the First Circuit denied their claim (without deciding whether considering such costs would be improper) because it was based on a misreading of the record. *Id.* ("Apparently petitioners read the cost figure ... as including the estimated costs of delay and reengineering as well as additional

tunnelling. ... The record is clear, however, that $20 million is the cost of the tunnelling alone.").

The First Circuit explicitly stated that the *Seacoast* petitioners "d[id] *not* argue that the cost may not be considered." *Id.* (emphasis added). The court's observation that "cost" – not cost-benefit analysis – "[is] an acceptable consideration in determining whether the intake design 'reflect(s) the best technology available,'" *id.*, is fully consistent with *Riverkeeper I* and *Riverkeeper II*, which found both economic availability and cost-effectiveness to be proper considerations. Indeed, we readily acknowledge that consideration of compliance costs (as opposed to cost-benefit analysis) is proper under section 316(b).

To be sure, the First Circuit also noted that the EPA "Administrator decided that moving the intake further offshore might further minimize the entrainment of some plankton, but only slightly, and that the costs would be 'wholly disproportionate to any environmental benefit.'" *Id.* But that decision was apparently based on *cost-effectiveness* (because the two intake locations had essentially the same benefit), rather than cost-benefit. *See Riverkeeper II*, App. 20a-21a (comparing the two types of analyses). Certainly, nothing in the First Circuit's opinion addresses the distinction drawn below between cost-effectiveness and cost-benefit analysis, let alone sets forth a *holding* on the point that conflicts with the Second Circuit's. Thus, contrary to PSEG's argument, it is not at all "clear [that] the First Circuit would have decided this case differently." PSEG at 25.

2. Nor are there any other conflicting appellate decisions.[5] PSEG's speculation that "the Sixth and D.C. Circuits ... would have decided this case differently," PSEG Pet. 21, is unfounded because those circuits have never construed section 316(b). The host of cases PSEG and the other petitioners cite construed the language of *other* sections of the Clean Water Act, such as sections 301, 304 and 306, or other environmental laws entirely. *See* PSEG Pet. 19-21; UWAG Pet. 27-28; Entergy Pet. 31-33. Thus, none of them is, or could be, in direct conflict because the heart of this case is section 316(b)'s distinctive text.

As petitioners themselves recognize, section 316(b)'s standard is "unique," PSEG Pet. 11; *see also* Entergy Pet. 4, and, as the Second Circuit has explained, "cooling water intake structures are *suorum generum*." *Riverkeeper I*, 358 F.3d at 186. That the court of appeals looked for "guidance" to other courts' interpretations of other CWA provisions, and observed that they support its construction of 316(b), does not

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[5] This Court need not consider UWAG's citation to a single sentence of *dicta* from *United States Steel v. Train*, 556 F.2d 822 (7th Cir. 1977), UWAG Pet. 21, because UWAG itself concedes there is no actual conflict with the Seventh Circuit on this point. *See id.* at 19 (arguing that First Circuit is "only other circuit that has decided the § 316(b) issue presented here"). In fact, *U.S. Steel* rejected, as premature, the argument that EPA must do a cost-benefit analysis, and it is unclear from the *dicta* UWAG cites to what extent that court's expectation of how EPA would take costs into account would differ from the cost-effectiveness analysis that the Second Circuit's decision permits. 556 F.2d at 850.

establish a conflict.[6] Thus, there is no merit to petitioners' and *amici*'s claims that the decision below should be reviewed because it "may also sweep far broader than §316(b)" and affect other CWA provisions or other laws, or "invite[ ] a rash of challenges to NPDES permits." PSEG Pet. 36; *see also* Entergy Pet. 31; CWISC *Amicus* Br. 16-17. In short, the Second Circuit interpreted only section 316(b) and did not purport to issue holdings concerning any other statutes.

PSEG's claim that "until this case, no court has ever held that EPA is *prohibited* from considering costs in relation to benefits," PSEG Pet. 20, merely reflects the fact that, before appearing to do so in promulgating its Phase II Rule, EPA never relied on cost-benefit analysis in promulgating BTA standards for

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[6] Petitioners' attempt to manufacture a conflict is also based on their incorrect suggestion that EPA may rely on cost-benefit analysis in establishing effluent limitations based on "best available technology" ("BAT") under sections 301 and 304. Their argument is irreconcilable with the language of the statute, 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(2)(B), and with *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980), which recognized that "in assessing BAT total cost is no longer to be considered in comparison to effluent reduction benefits." *Id.* at 71. Petitioners also mischaracterize *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978) and *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784 (6th Cir. 1995). In neither case had EPA used cost-benefit analysis to establish BAT, and thus neither court held such analysis proper. Rather, the Sixth Circuit decision cited the earlier D.C. Circuit decision, which was discussing the 1977 "best practicable control technology," or "BPT," standards, not the 1983 BAT standards. *Id.* at 796 (citing *Weyerhaeuser*, 590 F.2d at 1045).

intake structures under section 316(b) (or, for that matter, in promulgating BAT effluent limitations under sections 301 and 304). Petitioners acknowledge, as they must, that "numerous circuits have recognized that EPA is not required to consider costs and benefits when setting BAT," PSEG Pet. 20, but fail to identify any case where EPA *did* use cost-benefit analysis to set such standards, let alone a case where such a decision was upheld in court.

Finally, PSEG's argument that the decision below is "hard to reconcile" with *Riverkeeper I* not only fails to provide a basis for granting certiorari (after all, the Second Circuit is responsible for maintaining consistency of its own precedents, and no judge of that court favored rehearing *en banc*), but also relies on the mistaken contention that EPA's rejection of dry-cooling technology in its Phase I Rule was supported by "cost-benefit considerations." PSEG Pet. 21 n.2. In fact, the preamble to the Phase I Rule makes clear that "EPA has not selected the best technology available on a cost-benefit basis," and that EPA instead based that Phase I decision on "cost-effectiveness." 66 Fed. Reg. at 65,284, 65,309. EPA's reliance on cost-effectiveness in Phase I also rebuts Entergy's assertion that the court of appeals "made up" a "novel 'cost-effectiveness' test" in *Riverkeeper II*. Entergy Pet. at 25, 11.

B. Restoration Measures

In *Riverkeeper I*, the Second Circuit remanded the Phase I Rule's "restoration measures" provision as "plainly inconsistent with the statute's text and Congress's intent in passing the 1972 amendments," 358 F.3d at 189, and no party sought this Court's review of that decision. In the decision below, a

different panel reaffirmed that holding and remanded the Phase II Rule's nearly identical provision, stating: "our holding in *Riverkeeper I* was and remains clear: restoration measures contradict the unambiguous language of section 316(b)." App. 43a. The court's straightforward application of section 316(b) to the regulations at issue does not conflict with any other decision and does not warrant this Court's review.

Other than the *Riverkeeper I* and *Riverkeeper II* decisions, no court of appeals has ever had occasion to consider the issue of restoration under section 316(b). The First Circuit's 1979 *Seacoast* decision had nothing to do with restoration measures, which were not at issue in that case. Nor was the First Circuit there asked to consider whether "adverse environmental impact" under section 316(b) should be defined with respect to fish populations, individual fish, or both. While the court generally discussed the New Hampshire power plant's effect on individual fish as well as populations, 597 F.2d at 309-11, that discussion has no bearing on how that court would have viewed restoration measures.[7] *Seacoast* thus is manifestly not in conflict. Moreover, the rest of the decisions petitioners cite did not consider section 316(b) at all, but involved completely different statutes. *See* PSEG Pet. 30-31 (citing cases under the National Environmental Policy Act, among others); UWAG Pet. 34-36 (same).

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[7] Population effects were clearly relevant in that case under CWA section 316(a), 33 U.S.C. § 1326(a), which sets forth a very different standard than section 316(b), *see Riverkeeper II*, App. 53a & n.27 (explaining that "wildlife levels" can be considered under section 316(a), not section 316(b)).

C. Existing Facilities

Entergy alone contends that section 316(b) excludes existing facilities, but fails to offer even a plausible rationale for this Court's review of that issue. No court of appeals – and, indeed, to respondents' knowledge, no federal or state tribunal or agency at any level – has *ever* concluded that section 316(b) applies only to new facilities. Five years after the CWA was enacted, the Seventh Circuit upheld a NPDES permit imposing section 316(b) requirements on an existing facility. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 850 (7th Cir. 1977) (holding that EPA's construction of section 316(b) "to apply to *all* point sources ... comports with its plain meaning") (emphasis added). That holding has stood for over 30 years and Entergy does not cite any decisional authority that even suggests that the law is or should be otherwise, despite EPA's consistent application of section 316(b) to existing facilities over the last 35 years.

As Entergy acknowledges, *see* Entergy Pet. 20 & n.4, *United States Steel* not only held section 316(b) applicable to existing facilities, but also expressly affirmed EPA's authority to use NPDES permits to impose section 316(b) requirements. 556 F.2d at 850. Of the two decisions Entergy contends are in conflict on that point, neither even hinted that NPDES permits could not be so used. In *Virginia Electric & Power Co. v. Costle ("VEPCO")*, 566 F.2d 446 (4th Cir. 1977), the Fourth Circuit held only that original jurisdiction to review EPA's section 316(b) regulations lies in the court of appeals. *Id.* at 447. The Fourth Circuit's statement that section 316(b) regulations are

"other limitations" under sections 301 and 306, 566 F.2d at 450, accords with the decision below because NPDES permits include both effluent limitations and other limitations.

The other case Entergy cites, *Natural Resources Defense Council v. EPA*, 859 F.2d 156 (D.C. Cir. 1988), had nothing to do with section 316(b). There, the court held that EPA may not use NPDES permits to implement an *entirely different statute,* the National Environmental Policy Act ("NEPA"). *Id.* at 169. The court did not imply that NPDES permits may not be conditioned on compliance with relevant requirements of the CWA itself.

Finally, Entergy's additional request that this Court grant certiorari to resolve a claimed conflict over whether *Chevron* deference should be accorded agencies' interpretation of their own jurisdiction, Entergy Pet. 22-25, does not warrant serious consideration. Entergy did not raise this issue (or even characterize EPA's determination as "jurisdictional") below[8] and cannot now raise it here. *See Clingman v. Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below."). Further, the court of appeals did *not* simply defer to EPA's interpretation on this point; it based its decision on *Chevron* step one, holding "that section 316(b), on its face, applies to existing facilities" and "Congress intended the requirements of section 316(b) to apply in

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[8] *See* Brief of Petitioner Entergy Corp., July 5, 2005, at 14-35 in *Riverkeeper II*, Dkt. No, 04-6692-ag(L). Moreover, none of the other parties briefed the issue and the court of appeals did not discuss it *sua sponte*.

tandem with the effluent limitations established pursuant to sections 301 and 306." *Riverkeeper II*, App. 68a, 70a. The court's reference to *Chevron* step two was merely an alternative holding. *Id.* at 65a ("[A]t the very least, the EPA permissibly interpreted the statute..."). It is hard to imagine a case more poorly suited for review of the jurisdictional deference issue than this one, where the issue was not developed below and is not outcome-determinative.

III. THE DECISION BELOW IS CORRECT

A. Cost Considerations

Correctly employing traditional tools of statutory construction established by this Court, the Second Circuit based its conclusion that cost-benefit analysis would be inappropriate under section 316(b) on the plain meaning of the statutory text. By requiring in section 316(b) the "*best* technology *available* for *minimizing* adverse environmental impact" (emphasis added), Congress directed EPA to mandate the most protective technology feasible. The court thus recognized that section 316(b) leaves no room for weighing of costs and benefits: "the language of section 316(b) itself plainly indicates that facilities must adopt the *best* technology available and that cost-benefit analysis cannot be justified in light of Congress's directive." *Riverkeeper II*, App. 21a.

Put another way, "the statute therefore precludes cost-benefit analysis because 'Congress itself defined the basic relationship between costs and benefits.'" *Id.* at 22a (quoting *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509, (1981)). The Second Circuit's reading of the statute to exclude cost-benefit

analysis is fully consistent with this Court's decision in *American Textile Manufacturers* excluding cost-benefit considerations under the Occupational Safety and Health Act, as well as *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), where cost considerations were precluded by the "most natural of readings" of the Clean Air Act provision at issue there. *Id.* at 465.

Petitioners mistakenly criticize the Second Circuit's reliance on *American Textile*, arguing that that "every court of appeals that has addressed *American Textile*'s impact on cost-benefit analysis has held that the case is limited to whether cost-benefit analysis is *required* by statute." PSEG Pet. 26 (citing cases); *see also* UWAG Pet. 24-25; Entergy Pet. 33-34. On the contrary, the Fifth Circuit has recognized that the "rather broad holding" of that case "*rejected any implication of cost-benefit analysis.*" *Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 355 n.36 (5th Cir. 1981) (emphasis added). As this Court observed in *American Textile*, imposing a cost-benefit criterion onto a statute meant to be governed by feasibility would be "inconsistent" with the balance struck by Congress and "would eviscerate" the congressional scheme. 452 U.S. at 509, 513.[9]

The court of appeals was also correct to attach significance to Congress's failure to authorize cost-benefit analysis expressly in section 316(b), in contrast

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[9] Entergy disparages *American Textile* as a "pre-*Chevron* decision." Entergy Pet. 12. In fact, *American Textile* is a textbook example of what later came to be called step one of *Chevron*; it employed traditional tools of statutory analysis to discern the intent of Congress.

to other environmental statutes – and, in particular, other sections of the CWA – that explicitly call for cost-benefit balancing.[10] Because Congress has repeatedly demonstrated that it knows how to authorize cost-benefit considerations when it so chooses, the absence of any such authority in section 316(b) is evidence that it did not intend such considerations to govern here. "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *Am. Textile*, 452 U.S. at 510; *see also Whitman*, 531 U.S. at 467 ("We have therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.").

In giving weight to Congress's conspicuous failure to authorize cost-benefit analysis in section 316(b), the Second Circuit did not, as PSEG asserts, hand down a "new clear statement rule barring cost-benefit analysis whenever a statute is silent on the issue." PSEG Pet. 36. Rather, the court merely quoted this Court's own observation in *American Textile* about the significance of Congress's failure to authorize cost-benefit analysis explicitly. *See Riverkeeper II*, App. 22a-23a (quoting *Am. Textile*, 452 F.3d at 510). A lower court's quotation from one of this Court's decisions provides no basis for review by the Court.

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[10] *See, e.g.*, 33 U.S.C. §§ 1312(b)(2)(A), 1314(b)(1)(B), 1314(b)(4)(B). Other statutes expressly authorizing cost-benefit analysis include the Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(3)(C)(i)(IV), the fuel additive provision of the Clean Air Act, 42 U.S.C. § 7545(c)(2)(B), the Outer Continental Shelf Lands Act, 43 U.S.C. § 1347(b), and the Flood Control Act, 33 U.S.C. § 701a.

B. Restoration Measures

With respect to restoration, the court of appeals construed the specific language of section 316(b), including the statutory mandates that EPA regulate (1) the "location, design, construction, and capacity of cooling water intake structures" (2) to "minimiz[e]" their "adverse environmental impact," and found that EPA's restoration provision contradicted the statute in both respects. Off-site ecological improvement activities "have nothing to do with the location, design, construction, or capacity of cooling water intake structures."[11] App. 41a (quoting *Riverkeeper I*, 358 F.3d at 189). Moreover, attempts to "'*correct* for the adverse environmental impacts of impingement and entrainment ... do not *minimize* those impacts in the first place.'" *Id.*

The court of appeals recognized that "a rule permitting compliance with the statute through restoration measures allows facilities to avoid adopting *any* cooling water intake structure technology at all, in contravention of the Act's clear language as well as its technology-forcing principle." App. 44a; *see also Riverkeeper I*, 358 F.3d at 190 (referring to "Congress's intent that the 'design' of intake structures be

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[11] Petitioners argue that barrier nets and closed-cycle cooling systems are no more a part of the "location," "design," "construction," or "capacity" of intake structures than restoration measures. PSEG Pet. 30; UWAG Pet. 31-32. In fact, barrier nets are part of the "design" of the intake because they are placed in front of it to exclude fish. Similarly, a requirement, such as EPA's Phase I Rule, that intakes be *designed* to withdraw no more water than a closed-cycle system, clearly regulates the "design" and "capacity" of an intake structure.

regulated directly, based on the best technology available").

Petitioners argue that the word "reflect" in section 316(b) authorizes EPA to require *no* protective technology at intake structures if off-site ecological improvement activities are successful. PSEG Pet. 30. But if Congress had so intended it would not have needed to use the words "location, design, construction, and capacity of cooling water intake structures" at all. It could have simply directed EPA to ensure suitable populations of fish. Instead, consistent with the principle that technology standards regulate pollution at its source, Congress mandated best technology for four specific aspects of cooling water intake structures. Of course, "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997).

In addition, as the court observed in *Riverkeeper I*, "EPA's own findings reveal that restoration measures are inconsistent with Congress's intent." 358 F.3d at 190. Since at least 1977, EPA has consistently defined "adverse environmental impact" under section 316(b) to include impingement and entrainment. In the Phase II rulemaking, as in Phases I and III, EPA "interpret[ed] adverse environmental impact as the loss of aquatic organisms due to impingement and entrainment." 69 Fed. Reg at 41,612; *see also* 69 Fed. Reg. 68,443, 68,473 (Nov. 24, 2004). Restoration measures contradict EPA's determination because they do not *minimize* or even limit "how many organisms a facility entrains or impinges." 358 F.3d at 189. Restoration measures therefore cannot satisfy section

316(b)'s command to "minimize[e] adverse environmental impact."

Petitioners also vastly overstate the prior use of restoration measures by power plants. In the briefing below, industry was able to offer examples of only six of more than 500 existing power plants that had ever used restoration measures to compensate for fish kills, and none of the cited permits allowed restoration as a *complete* substitute for available intake structure technology. Instead, restoration measures have only been allowed as a *partial,* supplemental measure or under regulatory authority other than section 316(b).[12]

C. Existing Facilities

As the court of appeals recognized, "section 316(b), on its face, applies to existing facilities" and "the cross-reference in section 316(b) to section 301 provides a clear textual basis for that conclusion." *Riverkeeper II*, App. 68a-69a. Section 316(b) commands that "[a]ny standard" promulgated by EPA for point sources *under CWA section 301* "shall require" BTA for cooling water intake structures. 33 U.S.C. § 1326(b). The "standards" promulgated under section 301 are the discharge standards for *existing* point sources. *E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 121 (1977) ("Section 301(b) defines the effluent limitations that shall be achieved by *existing* point sources....") (emphasis added); *see also* Entergy Pet. 5 (Section

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[12] For example, the permitting agency clearly stated that the restoration measures undertaken by PSEG at the Salem nuclear plant, *see* PSEG Pet. 4-5, were *not* utilized to fulfill BTA requirements under section 316(b). Joint Appendix 254.

301(e) requires EPA to establish limitations applicable to "'*all* point sources' ... whether existing or new").

The court of appeals also correctly found that by applying section 316(b) to four particular aspects of cooling water intake structures – their "location, design, construction, and capacity" – Congress did not signal an intention to exclude existing facilities, as an existing facility's intake location, design, construction and capacity can be regulated just as readily as a new facility's. *Riverkeeper II*, App. 67a-68a & n.32. If Congress had wanted to limit section 316(b)'s application to new facilities, it could have done so expressly, "which would have been a simple task to do." *Id.* at 68a.

Finally, the Second Circuit properly rejected Entergy's back-up argument that CWA section 402 does not authorize EPA to use NPDES permits to impose section 316(b) requirements. Section 316(b) states that standards applicable to point sources *under sections 301 and 306* shall include BTA requirements for cooling-water intakes, and section 402(a)(1)(A), 33 U.S.C. § 1342(a)(1)(A), in turn provides that NPDES permits shall require compliance with "*all* applicable requirements under sections [301 and 306]" (emphasis added). *See Riverkeeper II*, App. 68a-69a. The statute thus provides ample authority for EPA to incorporate the BTA requirements into NPDES permits, and Entergy's contrary argument would render section 316(b) meaningless by depriving EPA of a mechanism for imposing its requirements.

CONCLUSION

The petitions for writ of certiorari should be denied.

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